If 2202 (5)

Single Bench

IN THE HIGH COURT OF CHHATTISGAR AT BILASPUR

SECOND APPEAL NO. 513 /2004

APELLANT/ DEFENDANT : **Madhaw Prasad @ Nankun Halwai S/o Ramlal, aged 32 years, Resident of behind Jute Mill Police Station, Banjin Pali, Tehsil and District-Raigarh (C.G.)**

Versus

RESPONDENT / PLAINTIFF **Smt. Ratan Kunwar W/o Durga, aged about 50 years, caste-Sawra, Resident of behind Jute Mill Police Station, Banjin Pali, Tehsil and District-Raigarh (C.G.)**

R. No. 2367/09 Presented by Shri M.S. Patel 3/7/09

MEMO OF SECOND APPEAL UNDER SECTION 100 OF THE CODE OF CIVIL PROCEDURE.

(42)

HIGH COURT OF CHHATTISGARH, BILASPUR

Single Bench:- Hon'ble Shri Justice Dhirendra Mishra
Second Appeal No.513 of 2004

Appellant :- Madhaw Prasad @ Nankun Halwai

Vs

Respondent :- Smt. Ratan Kunwar

Shri H.S.Patel, learned counsel for the appellant.

JUDGEMENT
(Delivered on 25/02/2005

The appellant has preferred this second civil appeal under Section 100 of Code of Civil Procedure against the judgement and decree as the suit of the plaintiff/respondent has been decreed by the trial Court and the appellant/defendant has been directed to give the possession of the suit property to the respondent/plaintiff and the judgment of the trial Court has been subsequently confirmed by the impugned judgement passed by the learned first Appellate Court. (Parties hereinafter shall be referred to as per their description in the trial Court.)

The plaintiff filed a suit for possession of the suit property described in the schedule appended with the plaint and for damages at the rate of Rs.10/- per day from the date of filing of the suit on the following averments that she is the owner of the suit property and was residing in the suit house with her husband who was working in the Jute Mill. However, after the closure of the Mill, her husband shifted to Calcutta for livelihood and she also joined her husband in October,1999. The defendant who was the neighbour of the plaintiff, taking advantage of absence of the plaintiff, encroached upon her house. On return from Calcutta in December, 1999, they learnt about the encroachment but however, the defendant refused to remove the encroachment and started quarreling. Then, the plaintiff preferred an application for demarcation before the Revenue Inspector and the report was submitted before the Tehsildar, Raigarh and as per order of Tehsildar, Revenue Inspector (diversion) conducted the

demarcation of the suit property in the presence of both the parties and on demarcation, it was found that the defendant has encroached upon 251 square feet of the land. After demarcation, the defendant encroached upon the whole land and dispossessed the plaintiff, whereupon the suit was filed.

The defendant in his written statement denied the claim of the plaintiff and stated that the suit property is the property of Jai Ram and in the said property, the name of mother of the plaintiff Hawa Sidarinbai was recorded as *Mourisi Haque* and the above land was subsequently recorded in the name of plaintiff and her sister after the death of her mother in the Land Revenue Records (Diversion), Raigarh. The land in question admeasuring 780 square feet, is a joint property of plaintiff and her sister. However, the real owner of the property is Jai Ram. It is further pleaded that out of 780 square feet of the disputed land 588 square feet belongs to Ratnabai which the defendant purchased for a consideration of Rs. 15,000/- vide sale agreement dated 07.12.1999 and since then he is in possession of the suit land and looking after the same. It was also objected to that since Ratnabai is also the owner of the suit property, the suit is liable for dismissal as for non-joinder of necessary parties, Ratnabai and Jai Ram and the suit is barred by Section 65 of the Limitation Act.

That the suit was decreed by the learned trial Court in the following terms;

That the plaintiff is entitled to recover possession of the suit property situated in Banjinpali Jute Mill, Raigarh as the defendant is in illegal possession of the same and the defendant shall hand over the vacant possession of the suit property to the plaintiff. The finding of the trial Court was that the plaintiff is the owner of the suit property admeasuring 436 square feet upon which the defendant has illegally encroached. However, the plaintiff is not entitled for damages and the suit is not liable for dismissal for non-joinder of parties and the suit is not barred by law of limitation.

On appeal by the defendant, learned first Appellate Court dismissed the appeal and confirmed the judgment of the trial Court by recording a finding that the suit has been filed by the plaintiff on the averment that she is the recorded owner of the suit property and on the basis of the pleading in written statement by the defendant, both the Courts below have arrived to the conclusion that on the suit property the plaintiff and her sister each had ½ share and the fact that

the defendant has admitted that he purchased ½ portion of Ratanbai for a consideration of Rs. 15,000/- vide document of Ex.D/1. Thus, on the pleadings of the parties and on the basis of material available on records, learned Courts below have recorded a finding that the plaintiff had ½ share and was in possession of the suit land and the house constructed over the suit land has been subsequently encroached by the defendant. Learned Courts below have also recorded a finding on the basis of demarcation report and documents of annexures P/1,P/2 and P/3 that the demarcation of the suit land was held in the presence of defendant on 27.03.2000 and accordingly the demarcation report was given on 03.04.2000 and, by which it has been found that defendant had encroached upon 251 square feet of land and he has signed the demarcation report and put the date of 27.03.2000 on it under her signature. On the basis of this evidence, it has been held that the defendant has encroached upon the suit land of the plaintiff and the contention of the defendant that he was not present at the time of demarcation, has been disbelieved by both the Courts below.

At this juncture, it would be worthwhile to mention that the defendant has moved an application under Order 41 Rule 27 of C.P.C. and has filed a document being the demarcation report dated 17.03.2005 prepared by the Revenue Inspector. Learned counsel for the appellant/defendant submits that he applied for demarcation of the plot Nos.67/2,68/2 area 704 square feet recorded in his name and on his application the demarcation was held on 11.02.2005 in the presence of inhabitants of locality and by this report, the defendant has not been found in any encroachment of any other person and he prays for taking this document on record as it is material for adjudication of the present appeal.

Heard on I.A.No.516/2005.

From perusal of the documents annexed with this application, it appears that before holding demarcation the plaintiff has not been noticed and the demarcation has been conducted in the absence of the plaintiff. There is no explanation in the instant application for delay in applying for demarcation as this exercise could have been done during the trial of the suit by the defendant and the same could be proved by him at the time of trial.

In the aforesaid circumstances, the above application filed under Order 41 Rule 27 of C.P.C. deserves to be dismissed and it is accordingly dismissed. Learned counsel for the defendant has assailed the concurrent findings of both

the Courts below on the ground that the plaintiff is not the owner of the suit property and the learned Courts below ought to have dismissed the suit for non-joinder of parties Jai Ram & others and Ratnabai. It is further submitted that the plaintiff has not established that she is the owner of the property in question and therefore, the suit for possession could not be decreed on the basis of the possession of the plaintiff.

However, both the Courts below have arrived to the conclusion of the concurrent findings on the basis of the pleadings of the respective parties that the plaintiff and her sister Ratnabai was joint owners of the suit property and further on the basis of the demarcation report held in the presence of the defendant that he has encroached upon the suit property and accordingly, decreed the suit for possession and all these facts are concurrent findings of facts. The claim of the defendant that he purchased the share of plaintiff's sister Ratnabai by paying Rs. 15,000/- has also been rejected on cogent reasons on the ground that the document of Ex.D/1 is an agreement by which the defendant has purchased the superstructure of the house and on the admission of the defendant that he is in possession of the share of Ratnabai, it has been held that the defendant has encroached upon the joint property of the plaintiff and her sister Ratnabai. On the basis of the above analysis, the learned Appellate Court by the impugned order has arrived to the conclusion that on the disputed land and the house, the plaintiff had ½ share in which the defendant has illegally encroached and accordingly confirmed the decree passed by the learned trial Court. The suit has been rightly held to be filed within limitation on the ground that it is alleged by the plaintiff that encroachment was done in the year 1999 and the same was established by demarcation on 09.04.2000 and the suit was filed on 09.11.2000, within prescribed period of limitation.

Thus, on the basis of the above analysis, I am of the opinion that there is no substantial question of law involved for adjudication of the present second appeal and the appeal has to be dismissed and it is accordingly dismissed.

However, in the facts and circumstances of the case, there shall be no order as to costs.

With the aforesaid observations, M.C.P.No.1524/04 stands disposed of.

Sd/-
DHIRENDRA MISHRA
Judge